AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal

In the Matter of the Arbitration Between:

Case Number: 01-21-0004-6899

Brian Wallenberg
-vs-
PJ Utah, LLC

PARTIAL AWARD

I, Daniel E. Williams, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, having been duly sworn, and having duly heard the proofs and allegations of the Parties, as well as having reviewed all of the submissions of the Parties, hereby issue this PARTIAL REASONED AWARD, as requested by the Parties, as follows:

I. INTRODUCTION.

An Arbitration Hearing was held via Zoom Conference on August 3, 2022, before the Arbitrator. Claimant Brian Wallenberg was represented by attorneys, Mark Potashnick of Weinhaus & Potashnick and Gregory A. Rich of Dobson, Berns & Rich, LLP. Respondent PJ Utah, LLC, was represented by William K. Hancock of Galloway, Scott & Hancock, LLC. Claimant testified on his own behalf and presented the testimony of expert witness, Michael Earner. Respondent called Stephen Saunders to testify. Subsequently, the Parties submitted substantial post-hearing briefs with multiple exhibits and authorities and the Hearing was closed.

II. SUMMARY.

At all relevant times, Claimant was a pizza delivery driver for Respondent PJ Utah. Prior to July 2021, he used three different personal vehicles to deliver pizzas on Respondent's behalf. Although Respondent provided some reimbursement for use of his private vehicles, Claimant maintains it was unreasonably low and did not cover certain "fixed" and other costs. This arbitration addresses claims brought by Claimant that Respondent's failure to reimburse fully vehicle expenses caused him to earn less than the minimum wage required under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (the "FLSA"). Claimant maintains that, based upon the U.S. Department of Labor's ("DOL") Field Operations Handbook, § 30c(15), promulgated under the FLSA, an employer must reimburse an employee who is required to utilize the employee's vehicle for the employer's benefit, in one of two ways. The two assertedly proper methods of reimbursement are set forth in the 2000 DOL Handbook as either (1) the IRS per mile rate ("the IRS rate") or (2) a reimbursement rate based upon detailed records of the employee's actual expenses kept by the employer.

Respondent argues in response that Claimant was paid for the time period in question either at or more than the minimum wage through his pay and reimbursements. Respondent points out that, in August of 2020, DOL issued an opinion letter (FLSA, 2020-12), stating that the IRS business standard mileage rate is not legally mandated under the FLSA and that in a case where an employee seeks to make a claim based upon "tools of the trade" expenses, such as vehicle costs, an employer may make a "reasonable approximation" of those costs to be reimbursed. Respondent further objects to several items of Claimant's estimates of his costs, if the IRS per mile rate is not utilized.

Earlier, the Arbitrator ruled that, among other things, Claimant could approximate his vehicle costs at Hearing. *See, Order on Dispositive Motion* of July 4, 2022. Reserved for Hearing were issues related to whether the IRS rate should apply or whether and how Claimant's estimates of vehicle costs would be determined. For the reasons explained below, the Arbitrator finds that the IRS rate should apply in this case.

III. DISCUSSION.

The August 2020 DOL opinion letter 2020-12 states that a reimbursement to cover expenses incurred on an employer's behalf is sufficient if it "reasonably approximates the expenses incurred." It goes on to state that reimbursement based on the IRS annual standard mileage rates "is per se reasonable." For all of the reasons set forth in *Waters II*, 2021 U.S. Dist. LEXIS 87604, at *16-27, the Arbitrator finds that the DOL opinion letter is generally unhelpful and inapplicable. *See also, Hatmaker v. PJ Ohio*, LLC, 2020 WL 6390657 (S.D. Ohio Sept. 28, 2020).[1] Instead, the DOL Handbook at 30c15 is designed for use by all DOL investigators and provides somewhat superior guidance to employers and employees. An employer may adopt its own expense reimbursement program and not follow the IRS mileage rate, but if it does so, the employer must look at an employee's actual fixed costs, which include depreciation, insurance and registration, as well as variable costs.

Here, it is undisputed that Respondent failed to account for appropriate fixed costs, such as insurance. It also did not take into account the actual vehicle Claimant was driving for significant periods of time. As another example, Respondent further failed to account for return deliveries. The very volume and complexity of the evidence as to the estimates of Claimant's vehicle costs lend weight to the conclusion that the IRS rate should apply in the absence of a far

[1] Of particular importance to the Arbitrator is the limited weight properly accorded to the DOL opinion letter, as explained in detail in *Waters II*.

greater effort on the part of Respondent to capture something truly approximating actual vehicle costs.

Thus, to the extent that Claimant was not properly compensated for his vehicle expenses, a portion of his wage was going toward those expenses, which were a "tool of the trade." Accordingly, Claimant is due the amount he was paid below the minimum wage for the period in question, taking into account the IRS business mileage rate. Based upon the evidence presented, Claimant is entitled to damages in the amount of $5,198.84 for the period beginning July 2018, which is three years prior to the commencement of this action. Claimant is further entitled to $2,099.95 for return deliveries, for which he was not reimbursed at all. The FLSA provides for a three-year limitations period when an employer's violation is "willful." Willfulness can be shown by complaints followed by inaction, an employer's knowledge of data that should alert it to violations or a significant gap between costs and reimbursements. *See, e.g., Smith v. Pizza Hut, Inc.,* 2011 U.S. Dist. LEXIS 76793, at *18-20 (D.Colo. July 14, 2011). The evidence established at hearing demonstrated that these factors were present so as to justify a finding of willfulness. The fact that Respondent only reimbursed Claimant at approximately half of the IRS rate should have alerted it that its methodology was flawed.

Liquidated damages up to two times the underlying unpaid wages are mandatory under the FLSA unless the employer demonstrates affirmatively "good faith and reasonable grounds" to believe that its actions were in compliance. 29 U.S.C. § 260. There is a "strong presumption in favor" of awarding liquidated damages. *See, e.g., Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986). Although Mr. Saunders testified credibly regarding his attempts in 2018 to update the approximation upon which Respondent reimbursed its drivers for vehicle costs, such efforts do not rise to the level of an affirmative defense in this context. As

noted above, his methodology still resulted in a reimbursement of only half the IRS rate. Further, as of 2018, the subject of proper reimbursement of pizza delivery drivers was well known to be a subject of significant litigation.

IV. PARTIAL AWARD.

Accordingly, the Arbitrator awards the following damages to Claimant:

Unreimbursed actual vehicle costs	$ 5,198.84
Unreimbursed actual return deliveries	$ 2,099.95
Subtotal	$ 7,298.79
Liquidated damages	$ 7,298.79
TOTAL AWARD:	**$14,597.58**

Claimant is also entitled to recover reasonable attorney's fees and costs under the FLSA, to be determined by motion. AAA is requested to schedule a telephonic conference at a mutually convenient time to address a briefing schedule, unless the Parties submit a mutually agreeable briefing schedule subject to approval of the Arbitrator.

This award shall remain in full force and effect until such time as a Final Award is rendered.

DATE: October 20, 2022

Daniel E. Williams

Daniel E. Williams, Arbitrator